Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(A)-695–06 OF 2020
NOR BEE ARIFFIN, AZIZAH NAWAWI AND GUNALAN MUNIANDY JJCA
6 AUGUST 2021

Civil Procedure — Injunction — Fortuna injunction — Appeal against granting of Fortuna injunction — Injunction to restrain winding up petition — Whether there was bona fide disputed debt — Whether grant of injunction was an abuse of court process — Whether injunction ought to be set aside — Whether discretion should be exercised in favour of the respondent — Whether appellate intervention was warranted

This was an appeal by the appellant against the decision of the learned judicial commissioner ('JC') in granting a fortuna injunction ('FI') to restrain the appellant from filing a winding up petition against the respondent based on a statutory notice dated 31 December 2016. The respondent was the main contractor appointed by Jabatan Pengairan dan Saliran Malaysia to execute construction works for a project. In turn, the respondent appointed the appellant as a subcontractor to execute certain parts of the works. The appellant commenced adjudication proceedings against the respondent under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012'), claiming a total amount of RM3,483,025.06. In the adjudication, the respondent contended that although there was an unpaid certified amount of RM1,255,794.63 and a variation of RM80,631.76, the claims were disputed because there was delay of 535 days in the appellant's completion of the subcontract works, and after a set off and cross claim of RM5,180,000 as liquidated and ascertained damages ('LAD'), there was no amount payable to the appellant. The adjudicator delivered his adjudication decision dated 31 October 2019 in favour of the appellant in the amount of RM1,806,538.76 under the said adjudication decision ('AD'). The appellant then applied for registration of the said AD as a court judgment and for enforcement of the same. The respondent contested the enforcement suit and filed an originating summons ('OS') to set aside the AD and further took steps to refer the dispute to arbitration. The respondent was then served with a statutory notice under s 466(1)(a) of the Companies Act 2016, demanding for RM1,806,538.76. The respondent filed an OS for an injunction to restrain the appellant from filing or continuing any winding up petition against the respondent based on the

A statutory notice and also to stay the adjudication decision pending the arbitration. The JC held that an injunction was granted to restrain the appellant from filing a winding up petition against the respondent based on the statutory notice. Hence, the present appeal on the grounds that: (a) there was no bona fide dispute on the debt as the respondent had admitted the debt B owing in the sum of RM1,464,603.39 in the written payment response; (b) the grant of the FI was an abuse of court process; and (c) the respondent had no financial capacity to pay the debt. The primary question that arose for determination was whether the FI granted to the respondent was premised on an application that was frivolous, unnecessary, a waste of time and had caused C costs to be incurred by the appellant as the successful party in the adjudication proceedings.

Held, allowing the appeal with costs:

D (1) At the time of the adjudication proceeding when the said OS was commenced, the appellant had yet to file a winding up petition as the 21 day notice had not expired. As such, the OS was premature, defective and an abuse of process of the court. It was grounded on the well settled principle that a winding up proceeding was not a proceeding for the E execution of a judgment and as such, s 13 of the CIPAA would not apply. By virtue of s 466(1)(a) of the Companies Act 2016 ('the CA'), as the statutory notice had been served on the respondent under s 466(1)(a) of the CA and as there was no settlement of the debt claimed, the respondent would be deemed to be incapable of settling its debts. F However, the JC appeared to have disregarded this issue in arriving at his decision to grant the FI despite it being an important consideration as to the financial capacity of the respondent to settle the AD (see paras 24–25).

G (2) Further, on the date of the hearing on 4 June 2020, the respondent had not provided particulars of a bona fide triable cause of action against the appellant. The respondent had yet to issue any letter of demand or notice to the appellant for any claim. Therefore, it was apparent that the respondent's assertion of a cross claim against the appellant for LAD H which was the very basis of the purported bona fide dispute of debt raised by the respondent was plainly not established. Hence, the JC's finding to the contrary to justify the grant of the FI was flawed (see paras 26–27).

(3) Central to the appellant's opposition to the respondent's OS was the respondent's admission of a debt due to the appellant in the sum of I RM1,463,603.39 as evidenced by the respondent's payment response to the notice of adjudication. However, the JC was of the view that the appellant was not entitled to be paid this sum as the respondent had a bona fide claim for LAD against the appellant for which there was no proceeding in court or the AIAC as of 4 June 2020. This was an erroneous

view in principle because the purported existence of the LAD claim was one of the important factors that led to the JC granting the FI whereas it was premature to consider the same bona fide (see para 29).

(4) A debt that has been admitted, could not be considered a disputed debt based on which the grant of an injunction to restrain the presentation of a winding up petition would be justified. Any application to grant the order under such circumstances should be regarded as an abuse of process of the court (see para 31).

(5) The two notices of application filed by the respondent namely to set aside the AD and to stay the execution of the AD were filed 42 days following receipt of the AD. More importantly, the respondent's notice of arbitration was served on the appellant more than seven months after the receipt of the AD. That was not conduct that was consistent with the respondent's stance that they would suffer irreparable loss should an injunction not be granted to restrain enforcement of the AD or the presentation of a winding up petition. On this issue, the appellate court did not agree with the JC's view that the delays were irrelevant because there were no deadlines stipulated for the filing of the above notices of application. The view was wrong in principle as a party seeking an injunction or a stay of execution must act timeously (see paras 35–36).

(6) The party ordered to make payment under the AD was not entitled to an order to restrain the successful party from presenting a winding up petition as the former had a statutory right to challenge the statutory notice or petition before the winding up court. Until and unless the AD was set aside, it could form the basis for the statutory notice which was the position in the present instance. Whether or not the respondent had a bona fide cross claim against the appellant on merits to challenge the petition was a matter to be adjudged by the winding up court. An unproven cross claim could not be the basis for restraining the filing of a winding up petition based on a valid and enforceable AD (see para 50).

(7) The purported negative impact on the respondent company should the winding up petition be not restrained was a baseless ground raised by the respondent to avoid paying the above judgment debt considering that their financial status was shown to be neither credible nor reliable. The overall conduct of the respondent and the grounds advanced in seeking the FI pointed to their intention to delay settlement of the said judgment debt which was not presently within their means and were not bona fide to protect their rights (see paras 53–54).

(8) The JC had erred in principle in failing to consider or correctly apply established principles and criteria for the grant of a FI against the enforcement of a proven judgment debt based on an AD contrary to the object and intention of the CIPAA for expeditious payments of proven

A construction claims. The JC further failed to strictly apply the principle expressly pronounced in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* on the basic premise of the respondent, as the losing party, in the adjudication proceeding to pursue court action or arbitration that may eventually prevail over or reverse the adjudication decision. This was an B uncertain event that should not be used to preclude the statutory right of the appellant to pursue a winding up action. Hence, there was merit in the present appeal to warrant appellate intervention to rectify the error of the High Court in failing to exercise its discretionary powers correctly. The JC had erroneously granted the FI (see paras 59–60).

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[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan pesuruhjaya kehakiman ('JC') yang bijaksana dalam membenarkan injunksi fortuna ('FI') untuk menghalang perayu daripada memfailkan petisyen penggulungan terhadap D responden berdasarkan notis statutori bertarikh 31 Disember 2016. Responden merupakan kontraktor utama yang dilantik oleh Jabatan Pengairan dan Saliran Malaysia untuk melaksanakan kerja-kerja pembinaan bagi suatu projek. Sebaliknya, responden melantik perayu sebagai subkontraktor untuk melaksanakan bahagian-bahagian tertentu kerja tersebut. Perayu memulakan E prosiding adjudikasi terhadap responden di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('CIPAA 2012'), dengan menuntut jumlah keseluruhan RM3,483,025.06. Dalam adjudikasi tersebut, responden menghujahkan bahawa walaupun terdapat jumlah yang diperakui belum dibayar sebanyak RM1,255,794.63 dan variasi RM80,631.76, tuntutan F tersebut telah dipertikaikan kerana terdapat kelewatan selama 535 hari dalam penyiapan kerja-kerja subkontrak oleh perayu, dan selepas penolak dan tuntutan silang sebanyak RM5,180,000 sebagai ganti rugi tertentu dan ditetapkan ('LAD'), tiada amaun yang kena dibayar kepada perayu. Adjudikator menyampaikan keputusan adjudikasinya bertarikh 31 Oktober G 2019 memihak kepada perayu sebanyak RM1,806,538.76 di bawah keputusan adjudikasi tersebut ('AD'). Perayu kemudiannya memohon pendaftaran AD tersebut sebagai penghakiman mahkamah dan untuk penguatkuasaannya. Responden membantah tindakan penguatkuasaan dan memfailkan saman pemula ('OS') untuk mengetepikan AD dan seterusnya H mengambil langkah untuk merujuk pertikaian tersebut kepada timbang tara. Responden kemudiannya diserahkan notis statutori di bawah s 466(1)(a) Akta Syarikat 2016, menuntut RM1,806,538.76. Responden memfailkan OS untuk injunksi bagi menghalang perayu daripada memfailkan atau meneruskan sebarang petisyen penggulungan terhadap responden berdasarkan I notis statutori dan juga untuk menggantung keputusan adjudikasi sementara menunggu timbang tara. JC memutuskan bahawa injunksi telah dibenarkan bagi menghalang perayu daripada memfailkan petisyen penggulungan terhadap responden berdasarkan notis statutory tersebut. Oleh itu, rayuan semasa atas alasan bahawa: (a) tiada pertikaian bona fide ke atas hutang

tersebut oleh kerana responden telah mengakui hutang yang kena dibayar sebanyak RM1,464,603.39 dalam jawapan pembayaran bertulis; (b) pemberian FI adalah penyalahgunaan proses mahkamah; dan (c) responden tidak mempunyai keupayaan kewangan untuk membayar hutang tersebut. Persoalan utama yang timbul untuk ditentukan adalah sama ada FI yang diberikan kepada responden adalah berdasarkan permohonan yang remeh, tidak perlu, membuang masa dan telah menyebabkan kos ditanggung oleh perayu sebagai pihak yang berjaya dalam prosiding adjudikasi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Pada masa prosiding adjudikasi apabila OS tersebut dimulakan, perayu masih belum memfailkan petisyen penggulungan kerana notis 21 hari belum tamat. Oleh itu, OS tersebut adalah pramatang, cacat dan penyalahgunaan proses mahkamah. Ia berdasarkan prinsip yang nyata bahawa prosiding penggulungan bukanlah prosiding untuk pelaksanaan penghakiman dan oleh itu, s 13 CIPAA tidak akan terpakai. Berdasarkan s 466(1)(a) Akta Syarikat 2016 ('CA'), kerana notis statutori telah disampaikan kepada responden di bawah s 466(1)(a) CA dan kerana tiada penyelesaian bagi tuntutan hutang, responden akan dianggap tidak mampu untuk menjelaskan hutangnya. Walau bagaimanapun, JC nampaknya tidak mengendahkan isu ini apabila membuat keputusan untuk memberikan FI walaupun ia merupakan pertimbangan penting mengenai keupayaan kewangan responden untuk menyelesaikan AD (lihat perenggan 24–25).

(2) Selanjutnya, pada tarikh perbicaraan pada 4 Jun 2020, responden tidak memberikan butir-butir mengenai kausa tindakan yang boleh dibicarakan secara bona fide terhadap perayu. Responden masih belum mengeluarkan sebarang surat tuntutan atau notis kepada perayu untuk sebarang tuntutan. Oleh itu, adalah jelas bahawa penegasan responden mengenai tuntutan silang terhadap perayu untuk LAD yang merupakan asas pertikaian hutang yang dikatakan bona fide yang dibangkitkan oleh responden adalah jelas tidak dibuktikan. Oleh itu, dapatan JC yang bertentangan dalam mewajarkan pemberian FI adalah cacat (lihat perenggan 26–27).

(3) Alasan kepada penentangan perayu terhadap OS responden adalah pengakuan responden terhadap hutang yang kena dibayar oleh perayu dalam jumlah RM1,463,603.39 sebagaimana yang dibuktikan oleh jawapan pembayaran responden terhadap notis adjudikasi. Walau bagaimanapun, JC berpandangan bahawa perayu tidak berhak untuk dibayar jumlah ini kerana responden mempunyai tuntutan bona fide untuk LAD terhadap perayu yang tiada prosiding di mahkamah atau AIAC setakat 4 Jun 2020. Ini adalah pandangan yang khilaf pada dasarnya kerana kewujudan tuntutan LAD yang dikatakan sebagai salah

satu faktor penting yang membawa kepada JC memberikan FI sedangkan ia adalah terlalu awal untuk mempertimbangkan bona fide tersebut (lihat perenggan 29).

(4) Hutang yang telah diterima, tidak boleh dianggap sebagai hutang yang dipertikaikan berdasarkan pemberian injunksi untuk menghalang pengemukaan petisyen penggulungan adalah wajar. Sebarang permohonan untuk membenarkan perintah dalam keadaan sedemikian hendaklah dianggap sebagai penyalahgunaan proses mahkamah (lihat perenggan 31).

(5) Dua notis permohonan yang difailkan oleh responden iaitu untuk mengetepikan AD dan menggantung pelaksanaan AD telah difailkan 42 hari selepas penerimaan AD. Lebih penting lagi, notis timbang tara responden telah disampaikan kepada perayu lebih daripada tujuh bulan selepas penerimaan AD. Itu bukanlah tindakan yang konsisten dengan pendirian responden bahawa mereka akan mengalami kerugian yang tidak boleh diperbaiki sekiranya injunksi tidak diberikan untuk menghalang penguatkuasaan AD atau pengemukaan petisyen penggulungan. Mengenai isu ini, mahkamah rayuan tidak bersetuju dengan pandangan JC bahawa kelewatan tersbut adalah tidak relevan kerana tiada tarikh akhir yang ditetapkan untuk pemfailan notis permohonan di atas. Pandangan tersebut pada dasarnya adalah salah kerana pihak yang memohon injunksi atau penggantungan pelaksanaan mesti bertindak tepat pada masanya (lihat perenggan 35–36).

(6) Pihak yang diperintahkan untuk membuat pembayaran di bawah AD tidak berhak mendapat perintah untuk menghalang pihak yang berjaya daripada mengemukakan petisyen penggulungan kerana ia mempunyai hak statutori untuk mencabar notis atau petisyen berkanun di hadapan mahkamah penggulungan. Sehingga dan melainkan AD diketepikan, ia boleh menjadi asas untuk notis statutori yang merupakan kedudukan dalam contoh semasa. Sama ada responden mempunyai tuntutan silang yang bona fide terhadap perayu atas merit untuk mencabar petisyen tersebut adalah satu perkara yang perlu diputuskan oleh mahkamah penggulungan. Tuntutan silang yang tidak terbukti tidak boleh menjadi asas untuk menghalang pemfailan petisyen penggulungan berdasarkan AD yang sah dan boleh dikuatkuasakan (lihat perenggan 50).

(7) Kesan negatif yang didakwa kepada syarikat responden sekiranya petisyen penggulungan tidak dihalang adalah alasan tidak berasas yang dibangkitkan oleh responden untuk mengelak daripada membayar hutang penghakiman di atas memandangkan status kewangan mereka terbukti tidak benar dan tidak boleh dipercayai. Tindakan keseluruhan responden dan alasan yang dikemukakan dalam memohon FI menunjukkan niat mereka untuk menangguhkan penyelesaian hutang penghakiman tersebut yang pada masa ini tidak dalam kemampuan

mereka dan tidak bona fide untuk melindungi hak mereka (lihat perenggan 53–54).

(8) JC telah terkhilaf secara dasarnya kerana gagal untuk mempertimbangkan atau menggunakan dengan betul prinsip dan kriteria yang ditetapkan untuk pemberian FI terhadap penguatkuasaan hutang penghakiman yang dibuktikan berdasarkan AD yang bertentangan dengan objek dan niat CIPAA untuk pembayaran segera tuntutan pembinaan yang dibuktikan. JC seterusnya gagal menggunakan prinsip yang dinyatakan secara jelas dalam *Likas Bay Precinct Sdn Bhd lwn Bina Puri Sdn Bhd* pada premis asas responden, sebagai pihak yang kalah, dalam prosiding adjudikasi untuk meneruskan tindakan mahkamah atau timbang tara yang akhirnya boleh mengatasi. atau mengakas keputusan adjudikasi. Ini adalah peristiwa tidak pasti yang tidak sepatutnya digunakan untuk menghalang hak statutori perayu untuk meneruskan tindakan penggulungan. Oleh itu, terdapat merit dalam rayuan ini untuk mewajarkan campur tangan rayuan bagi membetulkan kesilapan Mahkamah Tinggi yang gagal melaksanakan kuasa budi bicaranya dengan betul. JC telah terkhilaf membenarkan FI (lihat perenggan 59–60).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another case [2015] MLJU 1951; [2015] 1 LNS 756, HC (refd)

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd [2021] 8 MLJ 99, HC (refd)

Bina Puri Construction Sdn Bhd v Capriform Builders Sdn Bhd [2020] MLJU 426; [2020] 1 LNS 50, HC (refd)

Cookson (Widow and Administratrix of the Estate of Frank Cookson, Decd) v Knowles [1979] AC 556, HL (refd)

Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation [1976] 2 ACLR 349; [1978] VR 83, SC (refd)

Ibai Golf & Country Club Bhd v Laman Kejora Sdn Bhd [2019] 12 MLJ 446; [2019] 1 LNS 246, HC (refd)

Karisma Synergy Sdn Bhd v Gates PCM Construction (M) Sdn Bhd [2019] 1 CLJ 122, HC (folld)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1997] 1 CLJ 396, CA (refd)

Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244, CA (refd)

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224; [2019] 8 CLJ 433, FC (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)

UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499; [2015] 5 CLJ 527, HC (folld)

Legislation referred to

Companies Act 2016 ss 466(1), (1)(a), 486
Construction Industry Payment and Adjudication Act 2012 ss 13, 28, 28(3), 29, 30, 31,
Rules of Court 2012 O 45, O 46, O 47, O 48, O 49, O 50, O 51

Appeal from: Orginating Summons No BA-24NCC-8–01 of 2020 (High Court, Shah Alam)

Vijayalatha a/p P Velupillai (Vellupillai & Assoc) for the appellant.
Kelvin Ng Chun Yee (Eric Chan See Quan with him) (Vin & Isaac Lee) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This is an appeal by the appellant/defendant against the decision of the learned judicial commissioner ('LJC') dated 4 June 2020 in granting an injunction to restrain the appellant from filing a winding up petition against the respondent/plaintiff based on 31 December 2016 statutory notice.

BACKGROUND FACTS

[2] The respondent was the main contractor appointed by Jabatan Pengairan dan Saliran Malaysia to execute construction works for a project at the Melaka River. In turn, the respondent appointed the appellant as a subcontractor to execute certain parts of the works.

[3] The appellant commenced adjudication proceedings against the respondent under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012'). The appellant claims to a total amount of RM3,483,025.06 comprising:

(a) balance of certified claim Nos 1–16;
(b) non certified progress claims Nos 17–18;
(c) revised progress claim No 19;
(d) variation order; and
(e) remeasurement works and other miscellaneous items.

[4] In the adjudication, the respondent contended that although there was an unpaid certified amount of RM1,255,794.63 and variation of RM80,631.76, the claims were disputed because there was delay of 535 days in

the appellant's completion of the subcontract works, and after a set off and cross-claim of RM5,180,000 as liquidated and ascertained damages ('LAD'), there was no amount payable to the appellant.

[5] The adjudicator delivered his adjudication decision dated 31 October 2019 in favour of the appellant in the amount of RM1,806,538.76 under the said adjudication decision ('AD').

[6] In November 2019, the appellant commenced Shah Alam High Court Originating Summons No BA-24C(ARB)-8–11 of 2019 applying for registration of the said AD as a court judgment and for enforcement of the same. The respondent had filed its affidavit in reply dated 13 December 2019 to contest the enforcement suit. The respondent had also taken steps to refer the dispute to arbitration. On 12 December 2019, the respondent filed an originating summons to set aside the said AD.

[7] On 3 January 2020, the respondent was served with a notice dated 31 December 2019, described by the appellant as a statutory notice under s 466(1)(a) of the Companies Act 2016, demanding for RM1,806,538.76 being:

(a) RM48,765.24 as reimbursement of security paid in advance for the adjudication; and

(b) RM1,782,156.14 as adjudication sum awarded by the adjudicator in the said AD.

[8] The respondent filed an originating summons for an injunction to restrain the appellant from filing or continuing any winding up petition against the respondent based on the notice dated 31 December 2016.

[9] On 22 January 2020, the High Court judge granted an ex parte interim injunction to restrain the appellant from filing any winding up petition.

[10] In April 2020, the respondent also filed Originating Summons No BA-24C-32–04 of 2020 to stay the adjudication decision pending the arbitration.

FINDINGS OF THE HIGH COURT

[11] On 4 June 2020, the LJC decided that an injunction be granted to restrain the appellant from filing a winding up petition against the respondent based on the 31 December 2016 notice.

[12] The LJC held that consistent with the CIPAA's objective, it is

A appropriate for the beneficiary of a CIPAA adjudication decision to resort to ss 28–31 of the CIPAA 2012 by applying to the court for registration of the adjudication decision as a court judgment and thereafter enforce the court judgment for recovery of money according to one or more modes of execution of judgment under O 45–51 of the Rules of Court 2012. Such modes of
B execution of judgments are more compatible with the CIPAA 2012's objective of facilitating cashflows for contractors and service providers in the construction industry.

C **[13]** A just and equitable balance has to be struck between the rights of a successful litigant in adjudication proceedings in collecting his cashflow expeditiously pursuant to ss 28 –31 of the CIPAA and the rights of the loser in adjudication proceedings to pursue arbitration or court action for a final decision which may overturn or prevail over the provisionally binding
D adjudication decision. It is meant to treat the adjudication decision as disputable in the context of court proceedings relating to winding up so that in suitable cases where there is bona fide substantial dispute of debt the court may issue Fortuna injunction to restrain the drastic or extreme measure of resorting to winding up while preserving the statutory rights and remedies of the
E successful litigants in adjudication proceedings to recover their monies as per the adjudication sums by way of the ordinary modes of execution in O 45–51 of the Rules of Court 2012.

THE APPELLANT'S SUBMISION

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[14] Counsel for the appellant submitted that the respondent had admitted the debt owing in the sum of RM1,464,603.39 vide written payment response. Therefore, there is no bona fide dispute on the debt by the respondent. The grant of the present Fortuna injunction was an abuse of the court process.

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[15] The respondent did not have the financial capacity or means to pay the debt. The respondent did not exhibit in the latest audited accounts or bank statement. The respondent only exhibited the audited accounts up to the year
H 2017.

THE RESPONDENTS' SUBMISSION

[16] The respondents' submission can be summarised as follows:

I (a) the learned High Court judge had rightly determined that there was a bona fide dispute of the debt;

(b) there is no requirement that the arbitration must commenced by the hearing of the originating summons. It must be borne in mind that the

dispute is genuine and had been raised even as early as in the CIPAA adjudication proceeding itself; and

(c) just because the audited statement of accounts is not up to date doesn't automatically mean that the respondent is insolvent.

OUR DECISION

[17] We would start our analysis by looking at the basic premise of the LJC's decision that in considering the exercise of his discretion whether or not to grant a Fortuna injunction in this case, the judge has to also bear in mind the need to preserve the defendant's right to enforce the court judgment which it would probably obtain upon registration of the adjudication decision as a court judgment; the statutory right which s 28(3) of the CIPAA 2012 has provided and also the principles on the exercise of discretion which the House of Lords enunciated in the following words: If there are no statutory guidelines and the appellate court lays down certain guidelines for the exercise of discretion, the trial judge is not precluded from departing where special circumstances exists in a particular case: *Cookson (Widow and Administratrix of the Estate of Frank Cookson, Decd) v Knowles* [1979] AC 556 (headnote), House of Lords, England.

[18] The LJC then went on to hold that he had exercised his discretion to grant the Fortuna injunction ('FI') as per the terms of the order dated 4 June 2020 ('the order') in the light of the totality of facts and circumstances of the case before him.

[19] Importantly, the LJC had accepted as settled that an adjudication decision as disputable in the context of the law of winding up is also consistent with the principle enunciated by our courts that winding up of a company should be a remedy of the last resort. We concur with the LJC's view that a just and equitable balance ought to be struck between the rights of a successful litigant in adjudication proceeding in collecting his cashflow expeditiously pursuant to ss 28–31 of the CIPAA and the rights of the loser in adjudication proceeding to pursue arbitration or court action for a final decision.

[20] However, the point of contention in this appeal is whether the LJC was right in his view that as the final decision by the High Court or the arbitrator may overturn or prevail over the provisionally binding AD, the AD should be considered disputable in the context of winding up proceedings to enforce the debt arising from the AD. Hence, where appropriate, it was contended that the debt should be considered a bona fide substantially disputed debt that would warrant a FI being granted to restrain resort to the drastic step of winding up

A proceedings. According to the LJC, it would not have the effect of preventing the successful litigant's statutory rights and remedies to recover their moneys in the adjudication by recourse to ordinary modes of execution pursuant to O 45–51 of the Rules of Court 2012 ('the ROC').

B **[21]** It was also impressed upon us by the defendant that the plaintiff had admitted an amount owing of RM1,464,603 but the LJC agreed with the plaintiff's submission that there was no admission of debt as such and found that in the factual context of the case, the plaintiff had confirmed there was an C unpaid certified amount of RM1,255,794.63 and a variation amounting to RM80,631.76, but the plaintiff had denied any liability to pay any amount to the defendant. Instead, the plaintiff's position was that after the set off against the liquidated and ascertained damages ('LAD') which the plaintiff had against the defendant, there should be a net amount payable by the defendant to the D plaintiff. Further, that the plaintiff acted with reasonable promptitude in filing the application to set aside the AD and the filing was done before the statutory notice was issued. There was, therefore, in his finding, no undue delay which warrant the court to decline its discretion, nor to infer a clear passivity indicative of mere afterthought. Based on the totality of the facts and E circumstances of the present case as alluded to by the LJC in his judgment, he concluded that the court's discretion should be exercised in favour of granting the FI prayed for by the plaintiff. In his view, the debtor's rights and remedies under the CIPAA 2012 were preserved to execute the court judgment which could be procured upon registration of the AD in court through the normal F modes of execution under the ROC.

[22] An important fact brought to our attention was that when the parties appeared before the LJC on 4 June 2020, the respondent's counsel had informed the LJC that the Respondent had initiated arbitration proceedings at G the AIAC for its LAD claim against the appellant. However, it was shown to us that the said proceeding was only begun on 10 June 2020 as the notice of arbitration was only received by the appellant on that day whereas the notification to the AIAC was only on 11 June 2020 in accordance with H article 3 of the AIAC Arbitration Rules 2018. Importantly, as at 4 June 2020, no arbitration proceeding had been commenced at the AIAC and neither was any notice of arbitration exhibited in any of the respondent's affidavit in the originating summons ('OS') seeking the FI.

I **[23]** The LJC appears to have failed to ask for proof from the respondent that they had commenced an action in court or at the AIAC for the purported LAD claim prior to the OS but went on to hold that the LAD claim had merits. He, however, failed to note that the respondent had made a bare allegation that arbitration proceedings had been commenced for this claim. Neither did the

LJC accede to the appellant's application that the aforesaid admitted debt be deposited in court as security as a condition for the injunction being ordered.

[24] Another factor raised by the appellant to oppose the present OS was that at the time of the adjudication proceeding when the said OS was commenced, the appellant had yet to file a winding up petition as the 21 day notice had not expired. As such, that appellant's contention which we found had basis was that the OS was premature, defective and an abuse of process of the court. It was grounded on the well settled principle that a winding up proceeding was not a proceeding for the execution of a judgment and as such, s 13 of the CIPAA would not apply.

[25] By virtue of s 466(1) of the Companies Act 2016 ('the CA'), as the statutory notice had been served on the respondent under s 466(1)(a) of the CA and there was no settlement of the debt claimed, the respondent would be deemed to be incapable of settling its debts. However, the LJC appears to have disregarded this issue in arriving at his decision to grant the FI despite it being an important consideration as to the financial capacity of the respondent to settle the AD.

[26] In essence, the question for our determination primarily was whether the FI granted to the respondent was premised on an application that was frivolous, unnecessary, a waste of time and had caused costs to be incurred by the appellant as the successful party in the adjudication proceeding. To be noted is that on the date of hearing on 4 June 2020, the respondent had not provided particulars of a bona fide triable cause of action against the appellant but was content to merely rely on general statements in its grounds in support of the OS. In this regard, on that date, the respondent had yet to issue any letter of demand ('LOD') or notice to the appellant for any claim. It warrants reiteration that neither had any writ action in court or arbitration been commenced as at 4 June 2020.

[27] Therefore, on the facts, it is apparent that the respondent's assertion of a cross-claim against the appellant for LAD which was the very basis of the purported bona fide dispute of debt raised by the respondent was plainly not established. Hence, the LJC's finding to the contrary to justify the grant of the FI appears to us to be flawed.

[28] We agree with the appellant's position that in principle even if a company is shown to be solvent but it is indebted to a creditor as in this case, simple refusal to pay upon service of the s 466(1)(a) notice cannot ordinarily justify the granting of an order legitimately restraining the commencement of a winding up petition.

[29] Central to the appellant's opposition to the respondent's OS is the respondent's admission of a debt due to the appellant in the sum of RM1,463,603.39 as evidenced by the respondent's payment response dated 24 May 2019 to the notice of adjudication. However, the LJC held the view that the appellant was not entitled to be paid this sum as the respondent had a bona fide claim for LAD against the appellant for which there was no proceeding in court or the AIAC as at 4 June 2020. We are in agreement with the appellant that this is an erroneous view in principle because the purported existence of the LAD claim that is one of the important factors that led to the LJC granting the FI whereas it was premature to consider the same bona fide.

[30] We agreed with the decision of the High Court in the case that the appellant cited, *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; [2015] 5 CLJ 527 as follows:

> [81] When served, a non-paying party responds to the payment claim by way of written 'payment response'. That 'payment response' sets out either the admission or dispute of the amount claimed, whether in respect of the whole or part of the payment claim. Where there is admission, the relevant amount is expected to be sent along with the payment response. Where there is dispute, the reasons for the dispute are required. There is a time period for the payment response (ten working days of the receipt of the payment claim); and a deeming provision where a non-paying party fails to respond to the payment claim. In such a case, that party is deemed to have disputed the entire payment claim (sub-s 6(4)).

[31] We accept that, in principle, a debt that has been admitted, cannot be considered a disputed debt based on which the grant of an injunction to restrain the presentation of a winding up petition would be justified. Any application to grant the order under such circumstances should be regarded as an abuse of process of the court.

(See *Ibai Golf & Country Club Bhd v Laman Kejora Sdn Bhd* [2019] 12 MLJ 446 ; [2019] 1 LNS 246.)

[32] We concur with the judgment of the case in *Karisma Synergy Sdn Bhd v Gates PCM Construction (M) Sdn Bhd* [2019] 1 CLJ 122 where the law on this point was succinctly stated as follows:

> The solvency or otherwise of the respondent is in this context of little relevance. Once the debt is shown not to be bona fide disputed on substantial grounds, and the presumption of insolvency unrebutted, even if the respondent could show that it was actually solvent, its refusal to pay up would still entitle the petitioner to pursue the winding up of the respondent.
>
> A neglect to payment in the first place triggers the statutory presumption under s 466(1)(a). The question then turns on whether the respondent debtor can show it is not insolvent in order to rebut the presumption. But even if the presumption is

rebutted, a continued refusal cannot deny the right of a creditor to file a winding up petition against a debtor. A

[33] It is settled law that the conduct of a party moving the court for an injunction is a material and vital factor in the determination of whether the injunction sought out to be allowed. The applicant must act timeously to protect his rights. B

[34] In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1997] 1 CLJ 396 the Court of Appeal per Gopal Sri Ram JCA (as he then was) remarked that: C

> It is cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt,* though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant. D

[35] We have paid attention to the sequence of events preceding the present OS for a FI. Inter alia, the two notices of application filed by the respondent: to set aside the AD dated 31 October 2019 and to stay the execution of the AD were filed only on 12 December 2019, ie, 42 days following receipt of the AD. More importantly, the respondent's notice of arbitration was served on the appellant only on 11 June 2020, which was more than seven months after the receipt of the AD. E F

[36] In our considered view, this is not conduct that is consistent with the respondent's stance that they would suffer irreparable loss should an injunction not be granted to restrain enforcement of the AD or the presentation of a winding up petition. On this issue, we do not agree with the LJC's view that the aforesaid delays are irrelevant because there are no deadlines stipulated for the filing of the above notices of application. This view is wrong in principle as a party seeking an injunction or a stay of execution must act timeously. G

[37] The respondent is correct in stating that the principle which the court has to decide whether to grant a Fortuna injunction is laid out in *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner Of Taxation* [1976] 2 ACLR 349; [1978] VR 83. Also, that the principle of this case has been applied in many cases in Malaysia, notably in the Court of Appeal case of *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316. H I

[38] The following passages from the judgment in *Mobikom* are relevant in the determination of this appeal:

[4] There is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interest of justice call for or demand it. So an injunction may be issued by our courts to restrain the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings. See, *Bsnc Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70; [2000] 2 CLJ 197. Similarly, a party may be restrained from presenting a winding up petition if it found, for example, that there is a bona fide dispute about the debt on which the notice of demand issued under s 218 of the Companies Act is based. See, *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533; *Stonegate Securities Ltd v Gregory* [1980] 1 Ch 576. Once the debt on which the proposed petition is based is bona fide disputed it matters not that the debtor company is in fact insolvent. See, *Mann and Another v Goldstein and Another* [1968] 1 WLR 1091; [1968] 2 All ER 769.

[5] The kind of injunction by which an intended winding up petition is sought to be restrained is known as a 'Fortuna injunction' taking its name from the case in which the juridical basis for the relief was first explained. (See *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner Of Taxation* [1976] 2 ACLR 349; [1978] VR 83). In that case, McGarvie J discussed the basis on which a court acts to restrain the presentation of a winding up petition and the two branches of the principle that guide courts in the grant of an injunction. In respect of the basis, His Honour said this:

> When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. *Mann and Another v Goldstein and Another* [1968] 1 WLR 1091, at pp 1093–4 ; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process.

[39] As to whether a successful party in an adjudication proceeding is entitled to present a winding up petition, the law is now settled with the advent of the Court of Appeal decision is *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244, it was held that one may proceed to wind up a company based on an adjudication decision under the CIPAA , even without having to first apply to enforce the same under s 28 of the CIPAA.

[40] In the above case, the appellant *Likas Bay* had objected to the presentation of the winding up petition claiming that they had a bona fide disputed debt for these reasons:

(a) Bina Puri had not applied for the adjudication decision to be enforced under s 28 of the CIPAA;

(b) that the statutory notice was defective because the adjudication decision ordered the monies to be paid to KLRCA and not the petitioner; and

(c) Likas Bay was expecting progress payment to be paid for a separate project and as such, it was not just and equitable for them to be wound up.

[41] However, the High Court and COA found that there was no disputed debt and ordered the winding up of the company because *Likas Bay*'s objection was neither on merits nor substantial ground.

[42] The respondent, on the other hand, placed much reliance on the judgment of the High Court in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99 which distinguished the principle in *Likas Bay* or the facts. In this case, the High Court restrained Econpile from winding up ASM based on an adjudication decision.

[43] In summarising the judgment in *ASM Development*, the appellant who considered it to be the thrust of its case, stated as follows:

> In deciding such, the learned judge (as His Lordship was formerly known) considered the nature and effect of an adjudication decision as provided under CIPAA. In this respect, among others:
>
> (a) section 28 merely allows for an application to enforce an adjudication decision 'as if it was a judgment or order' and not as a judgment of the high court. (The learned judge compares this against an arbitration award that is registered under the Arbitration Act 2005.) Thus, CIPAA does not intend for an adjudication decision to have the same effect as a court judgment;
>
> (b) whilst binding, s 13 of CIPAA confers an adjudication decision only a 'temporary finality' unless and until it is, among others, it is set aside or decided by arbitration or court; and
>
> (c) this temporary finality means that, an unlike a judgment, an adjudication decision by its very nature can be disputed, as s 13 of CIPAA clearly provides for the mechanism.

[44] While accepting the principle in *Likas Bay* the learned judge held that just because s 28 of the CIPAA does not include the right to initiate winding up proceedings, it does not bar one from presenting a winding up petition based on the adjudication decision. All it means is that the presentation of a winding up petition based upon an adjudication decision is not a specific statutory right provided under CIPAA and is therefore subject to the general principles relating to abuse of the process of the court referred to in *Fortuna Holdings* and the cases cited.

[45] The learned judge then proceeded to grant the restraining order sought by Econpile on the ground that, inter alia, even while the adjudication

proceeding was afoot, both parties had served notices of arbitration on each other for their respective in the course of the project.

[46] In their conclusion, the respondent submitted that applying the principles enunciated in *ASM Development*'s in the case herein, the learned High Court judge in our case was correct in allowing the OS:

(a) the respondent has a bona fide dispute to the adjudicated sum supported with sufficient evidence;

(b) the respondent disputes the debt based on substantial grounds;

(c) the respondent has commenced arbitration to refer all these disputes for a final determination; and

(d) the appellant ought to be restrained from presenting a winding up petition until the dispute has been finally resolved at arbitration.

[47] With respect, we do not agree with the conclusion reached by the LJC as, amongst others, the LJC had not accorded sufficient judicial appreciation to the settled principle enunciated in the *Likas Bay*'s case and the vital factors in the instant case that in our view, clearly did not favour the granting of a FI to restrain the appellant from filing a winding up petition.

[48] It is important to bear in mind that the Court of Appeal in *Likas Bay* pronounced in no uncertain terms without qualification that a party who is armed with an AD in its favour would be entitled to present a winding up petition based on the award.

[49] However, in *ASM Development* a contrary view was expressed that it does not mean the opposing party cannot challenge the petition or even the statutory notice. The debt under the adjudication decision can still be disputed and the court will have to decide whether it is so.

[50] With respect, to our minds, this does not equate to entitling the party ordered to make payment under the AD to an order to restrain the successful party from presenting a winding up petition as the former has a statutory right to challenge the statutory notice or petition before the winding up court. Until and unless the AD is set aside, it can in law form the basis for the statutory notice which was the position in the present instance. Whether or not the respondent had a bona fide cross-claim against the appellant on merits to challenge the petition is a matter to be adjudged by the winding up court. We are not convinced that an unproven cross-claim can be the basis for restraining the filing of a winding up petition based on a valid and enforceable AD.

[51] An important fact highlighted to us by the appellant was the respondent is an obviously insolvent entity and that their assertion was untrue that they were a solvent company and had the funds to settle the debt due under the AD to the appellant. It was stressed that till to date its current audited accounts and the monthly audited account for the year 2019 were not exhibited. What was exhibited was only the audited accounts up to the year 2017 which were about two years before the material time of the OS.

[52] It is also important for us to take cognisance of the Companies Commission of Malaysia ('CCM') search done by the appellant on the respondent's financial standing which showed that there were only audited accounts up to the year ending 31 December 2018 wherein the 'profit after tax' was only to the extent of RM219,334. As such the respondent certainly did not have the means or capability to settle the judgment debt under the court order dated 13 October 2020 which ran into more that RM1.7m not to mention interest at 5%pa from the date of the AD until realisation.

[53] In our view, the purported negative impact on the respondent company should the winding up petition be not restrained is a baseless ground raised by the respondent to avoid paying the above judgment debt considering that their financial status as exhibited in their affidavit in support was shown to be neither credible nor reliable. Instead, it reflected the respondent's insolvency and inability to pay the judgment debt.

[54] We are satisfied that, as correctly contended by the appellant, the overall conduct of the respondent and the grounds advanced in seeking the FI pointed to their intention to delay settlement of the said judgment debt which was not presently within their means and were not bona fide to protect their rights.

[55] Before concluding, we propose to highlight the objectives and legislative intent of the CIPAA 2012 which revolve around speedy and efficient dispute resolution in the construction industry to safeguard the public interest. On this point, we concur with the view expressed by the learned judge in the High Court case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another case* [2015] MLJU 1951; [2015] 1 LNS 756 as follows:

> Operation and application of CIPAA
>
> 135 Having examined the provisions of CIPAA, appreciated Parliament's intention in respect of CIPAA, understood how other jurisdictions have dealt, with adjudication, the next step is to recognise the Act for what it is; and that it is an Act providing for a 'speedy dispute resolution through adjudication'. The dispute that needs speedy resolution must necessarily be a dispute over payment claims in construction contracts. The provisions in the Act regulate the whole process of adjudication and for matters connected and incidental to adjudication. All this

A serves the object of ensuring and facilitating 'regular and timely payment in respect of construction contracts'.

[56] Similarly, the Federal Court in discussing the legislative purpose of enacting the CIPAA, remarked emphatically in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 8 CLJ 433 that:

> [53] When the High Court decided on both the enforcement and setting aside applications, the learned judge made the following observations:
>
> > [93] In all this debate we must not forget Parliament's intention in enacting CIPAA is to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters. The objective and purpose for CIPAA are to provide a solution to payment problems that stifles cash flow in the construction industry.

[57] Before us, having reviewed the authorities and principles relating to the CIPAA's objectives and the parties' respective contentions, the central question was whether the LJC had failed to properly and sufficiently appreciate and understand the objectives of CIPAA in granting the FI in this case. We have given due regard to the fact that there was a genuine debt owing to the appellant based on an AD that was in law binding and enforceable, including by recourse to winding up proceedings. The respondent was amply shown to be not capable of settling the judgment debt upon service of the s 486 statutory notice.

[58] Our considered view is that before concluding that the appellant was entitled to a FI, the LJC had failed to pay heed to established principles for the grant of a FI. Suffice for us to refer to the case cited by the appellant, *Bina Puri Construction Sdn Bhd v Capriform Builders Sdn Bhd* [2020] MLJU 426; [2020] 1 LNS 50 which held that:

> 7. To be entitled to be granted a Fortuna injunction, the plaintiff must satisfy that:
>
> (a) the winding up petition intended by the defendant has no chance of success whether as a matter of law or fact. This is also to say that there is a bona fide dispute of the debt on substantial ground so that presentation of the winding up petition to enforce payment would amount to an abuse of the process of the court.
>
> (b) the presentation of winding up petition intended by the defendant might produce irreparable damage to the plaintiff company. See: *Holdings PVT Ltd v The Deputy Commissioner of Taxation* [1978] VR 83; *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA and *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 (CA).
>
> 20. As regards the case of *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn*

Bhd [2000] 4 MLJ 657; [2000] 4 CLJ 437; [2000] 1 MLRA 649 (FC), ... this case does not support the proposition that Fortuna injunction should be granted to restrain the presentation of the winding up petition against a company whenever it is established that it is solvent and yet it can continue in not paying its indisputable debt to its creditor.

CONCLUSION

[59] In the circumstances, our decision would be that the LJC had erred in principle in failing to consider or correctly apply established principles and criteria for the grant of a FI against the enforcement of a proven judgment debt based on an AD contrary to the object and intention of the CIPAA for expeditious payments of proven construction claims. In our view, the LJC was plainly wrong in failing to strictly apply the principle expressly pronounced in *Likas Bay* on the basic premise of the right of the respondent as the losing party in the adjudication proceeding to pursue court action or arbitration that may eventually prevail over or reverse the AD. This is an uncertain event that should not be used to preclude the statutory right of the appellant to pursue a winding up action.

[60] Hence, our judgment is unanimous that there is merit in this appeal to warrant appellate intervention to rectify the error of the High Court in failing to exercise its discretionary powers correctly. The LJC had erroneously granted the Fortuna injunction. The appeal this is hereby allowed with costs. Decision of the High Court dated 4 June 2020 is set aside. Costs of RM15,000 to the appellant here and below subject to payment of allocator.

Appeal allowed with costs.

Reported by K Selvaraju